No. 98-5881

In The

Supreme Court of the United States

October Term, 1998

BENJAMIN LEE LILLY,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

On Writ Of Certiorari To The
Supreme Court Of Virginia

MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE AND BRIEF OF NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, VIRGINIA COLLEGE OF CRIMINAL DEFENSE ATTORNEYS, AND VIRGINIA CAPITAL CASE CLEARINGHOUSE AS AMICI CURIAE IN SUPPORT OF PETITIONER

WILLIAM S. GEIMER*
Professor of Law
Washington and Lee University
Virginia Capital Case Clearinghouse
Lexington, VA 24450
(540) 463-8525
Counsel for Amici Curiae
**Counsel of Record*

[Additional Counsel Listed On Inside Cover]

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Of Counsel:
LISA KEMLER
National Association of
Criminal Defense Attorneys
108 N. Alfred Street
Alexandria, VA 22314
(703) 684-8000

MARVIN MILLER
Virginia College of Criminal
Defense Attorneys
1203 Duke Street
Alexandria, VA 22314
(703) 548-5000

QUESTION PRESENTED

Whether the admission into evidence of a custodial confession by an alleged accomplice, which confession inculpates a criminal defendant in a capital murder case, consistently minimizes the declarant's role and shifts blame onto others, offered under a state exception to the hearsay rule as a declaration against interest of an unavailable witness when the alleged accomplice refused to testify under the Fifth Amendment, violates the Sixth and Fourteenth Amendments?

IN THE SUPREME COURT OF THE UNITED STATES

BENJAMIN L. LILLY,

Petitioner,

vs. No. 98-5881

COMMONWEALTH OF VIRGINIA,

Respondent.

MOTION OF NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, VIRGINIA COLLEGE OF CRIMINAL DEFENSE ATTORNEYS AND VIRGINIA CAPITAL CASE CLEARINGHOUSE FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF

COME NOW the National Association of Criminal Defense Lawyers (NACDL), the Virginia College of Criminal Defense Attorneys (VCCDA), and the Virginia Capital Case Clearinghouse (VCCC), pursuant to Supreme Court Rule 37.2(b), and move this Honorable Court for leave to file an *amicus curiae* brief in support of the Petitioner. In support of this motion, NACDL, VCCDA, and VCCC state the following:

1. Counsel for Petitioner has consented to the filing of an *amicus curiae* brief by NACDL, VCCDA and VCCC. Counsel for Respondent has withheld consent.

2. NACDL is a non-profit corporation with more than 10,000 members nationwide and 28,000 affiliate members in 50 states, including private criminal defense lawyers, public defenders and law professors. The American Bar Association recognizes NACDL as an affiliate organization and awards it

full representation in its House of Delegates. NACDL was founded in 1958 to promote study and research in the field of criminal law, to disseminate and advance knowledge of the law in the are of criminal practice, and to encourage the integrity, independence, and expertise of defense lawyers in criminal cases. NACDL seeks to defend individual liberties guaranteed by the Bill of Rights and has a keen interest in ensuring that legal proceedings are handled in a proper and fair manner. Among NACDL's objectives is promotion of the proper administration of justice.

3. VCCDA is recognized by NACDL as its Virginia state affiliate. It is a statewide non-profit organization of approximately 416 criminal defense practitioners. It's purpose is to enhance and improve the quality of criminal justice in the Commonwealth of Virginia and to advance the same general goals of NACDL within the particular framework of Virginia practice. To that end, it conducts continuing legal education seminars for criminal defense practitioners, and provides direct services to its members when they face important issues implicating the fundamental fairness of the criminal justice system. These services include litigation advice and support, research, and amicus briefing.

4. Virginia Capital Case Clearinghouse is a clinical program of Washington and Lee University School of Law. Its competitively selected students and tenured faculty director pursue a single paramount goal; making the right to effective assistance of counsel meaningful in Virginia capital cases. That goal also describes the interest of VCCC in the case at bar.

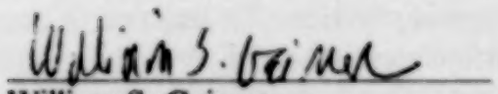
Virginia Capital Case Clearinghouse has been in operation since 1988, and has assisted defense counsel in hundreds of cases, including this case at trial and on direct

appeal. That experience has provided a unique vantage point from which to assess the issues before this Court.

5. The movants submit that an *amicus curiae* brief is desirable in light of the impact any decision made in the case will have on the Sixth Amendment right to confrontation. The movants seek leave to submit the accompanying brief *amicus curiae*, which they hope will assist the Court in deciding the Constitutional issue before it.

WHEREFORE, based upon the foregoing, NACDL, VCCDA and VCCC respectfully request that this motion be granted.

Respectfully Submitted,



William S. Geimer
Washington and Lee University
School of Law
Lexington, Virginia 24450

Counsel for *Amicus Curiae*
National Association of Criminal
Defense Lawyers
Virginia College of Criminal Defense
Attorneys
Virginia Capital Case Clearinghouse

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Rules

Other Authorities

INTEREST OF AMICI CURIAE

The National Association of Criminal Defense Lawyers ("NACDL"), the Virginia College of Criminal Defense Attorneys ("VCCDA"), and the Virginia Capital Case Clearinghouse, A Special Project of Washington and Lee University School of Law ("VCCC"), pursuant to this Court's Rule 37.3(a), file this joint brief in support of the petitioner. Counsel for petitioner has consented to the filing of this brief. Counsel for respondent has withheld consent.[1]

NACDL is a non-profit corporation with a membership of more than 10,000 attorneys and 28,000 affiliate members in 50 states, including private criminal defense lawyers, public defenders and law professors. The American Bar Association recognizes NACDL as an affiliate organization and awards it full representation in its House of Delegates. NACDL was founded in 1958 to promote study and research in the field of criminal law, to disseminate and advance knowledge of the law in the area of criminal practice, and to encourage the integrity, independence, and expertise of defense lawyers in criminal cases. NACDL seeks to defend individual liberties guaranteed by the Bill of Rights and has a keen interest in ensuring that legal proceedings are handled in a proper and fair manner. Among NACDL's objectives is promotion of the proper administration of justice.

VCCDA is recognized by NACDL as its Virginia state affiliate. It is a statewide non-profit organization of

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[1] No counsel for any party to this case authored this brief in whole or in part, and no person or entity other than NACDL, VCCDA, or VCCC and their members made any monetary contributions to its preparation or submission. *See* Rule 37.6.

approximately 416 criminal defense practitioners. Its purpose is to enhance and improve the quality of criminal justice in the Commonwealth of Virginia and to advance the same general goals of NACDL within the particular framework of Virginia practice. To that end, it conducts continuing legal education seminars for criminal defense practitioners, and provides direct services to its members when they face important issues implicating the fundamental fairness of the criminal justice system. These services include litigation advice and support, research, and amicus briefing.

Virginia Capital Case Clearinghouse is a clinical program of Washington and Lee University School of Law. Its competitively selected students and tenured faculty director pursue a single paramount goal: making the right to effective assistance of counsel meaningful in Virginia capital cases.[2] That goal also describes the interest of VCCC in the case at bar.

Virginia Capital Case Clearinghouse has been in operation since 1988, and has assisted defense counsel in hundreds of cases at trial and on direct appeal. That experience has provided a unique vantage point from which to assess the issue before this Court. It is particularly important in the Commonwealth of Virginia that the Confrontation Clause of the Sixth Amendment not be reduced to a mere form of words.[3]

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2 The program statement of purpose reads: "The Virginia Capital Case Clearinghouse is not about theoretical or philosophical support for or opposition to the death penalty. Rather, it is about commitment to the principle that one who stands to forfeit his life is entitled to the effective assistance of counsel, both for his sake and for the sake of those who would take that life."

3 Amici adopt the petitioner's Statement of Facts.

SUMMARY OF ARGUMENT

While all hearsay statements of accomplices in custody are inherently unreliable, the statement of Mark Lilly was even more suspect than usual. Virginia law governing accomplice liability in capital murder prosecutions operates to render Mark Lilly's statement that Benjamin Lilly caused the victim's death not only unreliable, but actually self-serving. The hearsay statement, if true, shielded Mark Lilly from a possible death sentence and even relieved him from a mandatory sentence of life without parole. The self-inculpatory aspects of his statement pale in comparison to the benefits that would accrue to him under Virginia law. Particularly in Virginia, there is no reason to establish a Confrontation Clause standard that is less stringent than that applied by this Court under the Federal Rules of Evidence.

In Virginia, as elsewhere, capital murder prosecutions involving multiple defendants who name others as the "trigger" are common. These statements are often given to law enforcement officers who have no independent corroborating information and sometimes have little interest in obtaining it. Currently, many of these purported accomplices enter into plea agreements that provide for their testimony at the trial of the person they have named. Presently, it is the function of confrontation and cross-examination to allow the jury to assess the factors that influenced the statements of the purported accomplice who arrived first at the office of the prosecutor.

"[T]he arrest statements of a codefendant have traditionally been viewed with special suspicion. Due to his strong motivation to implicate the defendant and to exonerate himself, a codefendant's statements about what the defendant said or did are less credible than ordinary hearsay evidence." *Williamson v. United States*, 512 U.S. 594, 601 (1994) (quoting

Lee v. Illinois, 476 U.S. 530, 541 (1986)). The ability to confront and cross-examine one's accuser is fundamental and essential to a fair trial. As this Court has recognized, "[c]ross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested." *Davis v. Alaska*, 415 U.S. 308, 316 (1974). And, regarding

> confrontation and cross-examination this Court said in *Green v. McElroy*, 360 U.S. 474, 496-97:
>
> > They have ancient roots. They find expression in the Sixth Amendment which provides that in all criminal cases the accused shall enjoy the right "to be confronted with the witnesses against him." This Court has been zealous to protect these rights from erosion.

Pointer v. Texas, 380 U.S. 400, 404 (1965).

Unless the defendant has an opportunity to cross-examine the very person who is pointing the finger at him and accusing him of being the "triggerman," the jury will have no basis for determining the trustworthiness of the statement. Where jurors have the opportunity to see the witness confronted, they have the ability to observe for themselves the witness' demeanor and may decide, as is their right, not to credit the witness' testimony. As a practical matter, however, if the protection of the Confrontation Clause is withdrawn by this Court, Virginia prosecutors will be encouraged not to run this risk. It is difficult to imagine a case where the better choice of prosecution witness would not be the law

enforcement officer who took the statement of the purported accomplice. Efficiency might be enhanced by such a practice, but truth wold certainly be the principal casualty.

The constitutional error in this case was far from harmless. The issue before this Court is of great importance in the capital appellate law of Virginia, as well as other states, where the application of evidentiary rules results in the denial of an accused's constitutional right to confrontation. With the exception of relief compelled directly by decisions of this Court, the Supreme Court of Virginia has granted relief to death sentenced prisoners only twice in this decade. In both instances the basis for relief was insufficiency of the evidence that the defendant caused the death of the victim. Absent the unlawfully admitted hearsay statement of Mark Lilly, it is highly probable that Ben Lilly would not be on death row.

ARGUMENT

I. SELF-SERVING STATEMENTS WHICH SHIFT THE BLAME FOR A CRIME TO ANOTHER ARE UNRELIABLE AND INADMISSIBLE.

Our Constitution presumes that the accurate determination of guilt or innocence in a criminal case is best accomplished by giving the accused the opportunity to confront and cross-examine witnesses against him. Despite the seemingly absolute terms of the Confrontation Clause, tradition makes exception for out-of-court statements by unavailable declarants under circumstances that assure some degree of reliability. This can be accomplished in either of two ways: by showing that the statement fits within a "firmly rooted" hearsay exception, or by establishing from the circumstances of the particular statement indicia of trustworthiness. *Idaho v.*

Wright, 497 U.S. 805 (1990).

This case involves the admission of a statement by Mark Lilly following his arrest in which he disavowed responsibility for a murder during the course of a robbery and identified petitioner as the triggerman. This statement protected Mark Lilly from prosecution for capital murder, despite his participation in a string of robberies, including one resulting in a death, and despite evidence that he possessed the murder weapon and passed it to petitioner immediately before the shooting. JA 2051, 2063-64. For petitioner, admission of this statement made the difference between a conviction for first degree murder and a conviction for capital murder; under Virginia law, evidence that petitioner was the triggerman was needed to make him eligible for a death sentence. Given the crucial importance of the identity of the triggerman under Virginia's death penalty scheme and Mark Lilly's interest in avoiding prosecution for capital murder, his hearsay statements were inherently unreliable and their admission violated the Confrontation Clause, applicable to the states through the Due Process Clause of the Fourteenth Amendment. *Pointer v. Texas*, 380 U.S. at 404.

A. The Hearsay Testimony Of Mark Lilly Was Self-Serving And Devoid Of Reliability.

The true significance of Mark Lilly's hearsay testimony can only be understood by reference to Virginia state law. Title 18.2, section 18 of the Code of Virginia contains the common provision that accomplices may be indicted, tried, and punished as principals in the first degree.[4] In cases of **capital murder**, however, the section provides that accomplices may be convicted of no higher offense than first degree murder, a non-capital offense.[5]

For Mark Lilly, acceptance as truth of his statement naming Ben Lilly as the person who caused the death of the victim meant the first of two enormous benefits accruing to Mark Lilly: immunity from exposure to a sentence of death. This is hardly an indicia of reliability. It is, in fact, just the opposite.

The second great benefit accruing to Mark Lilly if his statement was believed was the possibility of one day regaining his liberty. That possibility is not provided for in the case of persons convicted of capital murder in Virginia, even if they are sentenced to life in prison rather than death. In Virginia, a defendant convicted of capital murder faces one of two mandatory penalties: a sentence of death or life imprisonment without possibility of parole.[6] A defendant convicted of first degree murder, on the other hand, is guilty only of a Class 2 felony.[7] Not only is the possibility of the death penalty completely removed,[8] the defendant may be sentenced to as

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[4] "[I]n the case of every felony, every principal in the second degree and every accessory before the fact may be indicted, tried, convicted and punished in all respects as if a principal in the first degree . . . ." Va. Code Ann. § 18.2-18 (Michie 1997).

[5] "An accessory before the fact or principal in the second degree to capital murder shall be indicted, tried, convicted and punished as though the offense were murder in the first degree." Id. (emphasis added).

[6] . Va. Code Ann. § 19.2-164.4 (Michie 1998). Any defendant sentenced to a term of incarceration for a felony in Virginia on or after January 1, 1995, is not eligible for parole. Va. Code Ann. § 53.1-165.1 (Michie 1994).

[7] Va. Code Ann. § 18.2-32 (Michie 1998).

[8] Va. Code Ann. § 18.2-10 (Michie 1995).

little as 20 years.[9]

Therefore, when Mark Lilly stated his version of the criminal events, giving himself a secondary role in the crime while fingering his brother Ben Lilly as the triggerman, he actually did himself a great service. While his story contains self-inculpatory statements, within the framework of Virginia law described above and in the context of a custodial statement to police, it is actually quite self-serving.

B. Admission Of Mark Lilly's Confession As An Exception To The Hearsay Rule By Categorizing The Confession As A Declaration Against Penal Interest Cannot Be Squared With The Requirements Of The Confrontation Clause.

In Virginia, declarations against interest are admissible as an exception to the hearsay rule based on the notion that a person will not usually make statements damaging to his own penal interests unless such statements are true.[10] This is also the reasoning behind the federal evidentiary hearsay exception for statements against interest.[11] However, as a general matter, "[w]hen one person accuses another of a crime under circumstances in which the declarant stands to gain by inculpating another, the accusation is presumptively suspect and must be subjected to cross-examination." *Lee v. Illinois*, 476 U.S. at 541 quoted in *Williamson v. United States*, 512 U.S. at 608 (Ginsburg, J., concurring).

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9 *Id.*

10 2 Charles E. Friend, The Law of Evidence in Virginia § 18-12 (4th ed. 1993) (citing Eppes v. Eppes, 169 Va. 778, 195 S.E. 694 (1938)).

11 *See* Fed. R. Evid. 804(b)(3).

In *Williamson*, the defendant was convicted in a proceeding that featured the introduction by the state of a hearsay statement of the co-defendant. The hearsay testimony consisted of a confession that was broadly inculpatory of the co-defendant while also shifting criminal liability to Williamson. This Court found that "the most faithful reading of [the hearsay exception for statements against interest] is that it does not allow for the admission of non-self-inculpatory statements, even if they are made within a broader narrative that is generally self-inculpatory." *Williamson*, 512 U.S. at 600-01.

The facts of the instant case present an even more compelling need for the right to confront and cross-examine accusers than was present in *Williamson*. There, as this Court noted, the hearsay statement of witness Harris, if true, might have had the effect of rearranging the hierarchy of liability in a drug transaction, to Harris' benefit. This possibility was sufficient to call for remand to the Court of Appeals. *Williamson*, 512 U.S. at 604. Here, the benefit to Mark Lilly was quite literally a matter of life, death, and even potential liberty.

Although the *Williamson* court divided over the proper interpretation of Federal Rule of Evidence 803(b)(4) (declarations against penal interest), all members of the Court recognized that a statement like the one admitted at petitioner's trial does not bear the indicia of reliability associated with a statement against the declarant's penal interest. "The rationale for the hearsay exception for statements against interest is that people seldom 'make statements which are damaging to themselves unless satisfied for good reason that they are true.'" *Williamson*, 512 U.S. at 611 (Kennedy, J., dissenting) (quoting Notes of the Advisory Committee to Rule 804(b)(3)). The *Williamson* dissent went on to differentiate statements which

fit this definition from statements which, while containing some self-incriminatory information, primarily serve the declarant's interest:

> In the criminal context, a self-serving statement is one that stands to reduce the charges or mitigate the punishment for which the declarant might be liable. For example, if two masked gunmen robbed a bank and one of them shot and killed the bank teller, a statement by one robber that the other robber was the triggerman may be the kind of self-serving statement that should be inadmissible.

Williamson, 512 U.S. at 618 (Kennedy, J., dissenting). Thus, the dissenting justices agreed that a statement interwoven with declarations against penal interest should nevertheless be excluded when it is unreliably self-serving because "it shifts the blame to someone else for a crime the defendant could have committed," or when the declarant had a motive to obtain favorable treatment by making the statement. *Williamson*, 512 U.S. at 620. *See Williamson*, 512 U.S. at 601("a statement admitting guilt and made while in custody may well be motivated by a desire to curry favor with the authorities and hence fail to qualify as against interest."); 512 U.S. at 607 (Scalia, J., concurring) (same). As in *Williamson*, "[a] reasonable person in [Mark Lilly's] position might even think that implicating someone else would decrease his practical exposure to criminal liability, at least so far as sentencing goes." 512 U.S. at 604.

The unreliability of Mark Lilly's statement implicating petitioner as the triggerman is made even more apparent by the fact that, at the time of petitioner's trial, the charges against Mark Lilly were unresolved and the prosecution held over

Mark Lilly's head "the option charging [him] as the trigger man if he change[d] his story during his brother's trial and trie[d] to take the blame. JA 3605. Thus, the actions of the prosecution made him an unavailable witness when he invoked the Fifth Amendment, thereby satisfying the requirement for admitting the out-of-court statement. In short, the prosecution was able to choose whether the jury would hear from a live witness or whether it would receive self-serving hearsay.

While Virginia is free to define for itself the scope of its hearsay exception for declarations against penal interest, it cannot, by doing so, bypass the constitutional inquiry into the reliability of an out-of-court statement. The Virginia Supreme Court thought the fact "[t]hat Mark Lilly's statements were self-serving, in that they tended to shift principal responsibility to others or to offer claims of mitigating circumstances, goes to the weight the jury could assign to them and not their admissibility." *Lilly v. Virginia*, 255 Va. 558, 499 S.E. 2d 522, 534 (1998). But the whole point of the Confrontation Clause is that cross-examination is the best means to allow the jury to determine how much weight to give an accusation in light of the witness' self-interest in making it. The absence of cross-examination impairs the jury's ability to determine the weight it should give to evidence, and distorts the fact-finding process. As all members of this Court recognized in *Williamson*, self-serving statements like the statement admitted against petitioner are not reliable and are inadmissible even when interwoven with admissions of criminal liability. This Court has not yet determined whether the hearsay exception for declarations against penal interest is "firmly rooted," or whether the constitutional inquiry depends upon the circumstances surrounding each statement. *Williamson*, 512

U.S. at 605. Regardless of the answer to this question,[12] whether a particular statement falls within a "firmly rooted" hearsay exception is a question of federal constitutional law, not one determined by the scope recently given to a hearsay exception under the law of a particular state.

II. A HOLDING IN FAVOR OF THE COMMONWEALTH WILL EFFECTIVELY EVISCERATE THE SIXTH AMENDMENT CONFRONTATION CLAUSE IN VIRGINIA CAPITAL CASES.

Because under Virginia law only the person who caused death, the "triggerman," may be convicted of capital murder, this issue is of paramount importance in the Commonwealth. This is especially true when there is an absence of forensic or other independent evidence pointing unerringly to one of several co-defendants. The existence of multiple potentially culpable persons in an individual murder has rendered the triggerman issue central to the Commonwealth's case in numerous capital prosecutions.[13] In many such cases, the main

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12 On this point, this Court, in *Lee v. Illinois*, rejected the state's "categorization" of an accomplice's confession "as a simple 'declaration against penal interest" because "[t]hat concept defines too large a class for meaningful Confrontation Clause analysis." 476 U.S. at 544 n5. In addition, at common law the declarations against interest exception applied only to civil (not criminal) interests, making it implausible that the authors of the Confrontation Clause envisioned an exemption for statements like the one at issue in this case.

13 *See, e.g., Commonwealth v. Selby*, No. CR 96-51-0010202 (Cir. Ct. Dinwiddie County); *Commonwealth v. Burton*, No. F91-214 (Cir. Ct. Wise County); *Commonwealth v. Taylor*, No. 95-146,147, 148, 149 (Cir. Ct. Washington County); *Commonwealth v. Murray*, No. CR 901478 (Cir. Ct. City of Virginia Beach); *Commonwealth v. Holden*, No. 97 CR 141 (Cir. Ct. Accomack County); *Commonwealth v. Davis*, No. CR 94118-121 (Cir. Ct.

evidence implicating the defendant as the triggerman is derived from purported accomplices to the crime, who claim that they were not the one who killed the victim.[14] In the absence of compelling independent evidence on the point, its resolution may be heavily influenced by a race to the prosecutor's office. The triggerman statute creates an incentive, under circumstances of highly questionable reliability, for these co-defendants to make a plea agreement with the government in exchange for testifying that another defendant caused the victim's death.

Even under present law, the situation described above places a heavy burden on the right to confront and cross-examine as the primary device for ferreting out the truth.[15] If that right is removed, accurate identification of the accused who can lawfully be subjected to the death penalty will become a guessing game in many cases, further infused with arbitrary

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Smyth County); *Commonwealth v. Jones*, No. 8230 (Cir. Ct. York County).

14 *See Cardwell v. Commonwealth*, 248 Va. 501, 450 S.E.2d 146 (1994); *Weeks v. Commonwealth*, 248 Va. 460, 450 S.E.2d 379 (1994); *Ramdass v. Commonwealth*, 246 Va. 413, 437 S.E.2d 566 (1993); *Gray v. Commonwealth*, 233 Va. 313, 356 S.E.2d 157 (1987); *Correll v. Commonwealth*, 232 Va. 454, 352 S.E.2d 352 (1987); *Fitzgerald v. Commonwealth*, 233 Va. 615, 292 S.E.2d 798 (1982); *Coppola v. Commonwealth*, 220 Va. 243, 257 S.E.2d 797 (1979).

15 This is undoubtedly the reason this Court long ago declared the right to be fundamental and has emphasized its pivotal role in criminal trials. *Chambers v. Mississippi*, 410 U.S. 284, 93 S.Ct. 1038 (1973); *Pointer v. Texas*, 380 U.S. 400, 85 S.Ct. 1065 (1965). This Court also recognized long ago the importance to reliable capital sentencing of correctly determining who caused death. That question prompted this Court's seminal opinion on the due process right of an accused to exculpatory evidence. *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194 (1963). Both the question and the means available to answer it then, have been deemed essential to due process.

factors. That is because, while co-defendants have great incentive to name another as the killer, prosecutors will have little or no incentive to put them on the witness stand. If this Court upholds the Commonwealth's position in this case, there will be no reason for the state to put a purported accomplice on the stand and risk a potentially damaging cross-examination by defense counsel. Rather, the chosen tactic will be either to present the taped out of court statement, as in this case, or, even better, to have the fortunate chosen co-defendant make his statement to a law enforcement officer who can then testify at trial.[16]

A recent example of the critical need to subject purported accomplice testimony to cross-examination may be found in the cases of *Commonwealth v. Louis James Ceparano*, No. 97-186, 97-187 (Cir. Ct. Grayson County), and *Commonwealth v. Emmett W. Cressell, Jr.*, No. 98-73 (Cir. Ct. Grayson County). Both arose from the murder of G.P. Johnson on July 25, 1997, in Grayson County, Virginia. Ceparano, Cressell, Johnson and two women had been drinking together at Ceparano's trailer in Grayson County during the evening of July 24, 1997. In the early-morning hours of July 25, Johnson was burned and beheaded. The Commonwealth's Attorney initially decided that Ceparano killed Johnson. Ceparano was charged with capital murder and Cressell with first degree murder. Later, however, it was decided that Cressell was the "triggerman". Accordingly, a plea agreement was made with Ceparano and the charges against Cressell were upgraded to capital murder. At Cressell's trial, Ceparano testified for the prosecution, recounting the events of that night and implicating Cressell as the "triggerman" responsible for Johnson's murder. Ceparano was subjected to a two-hour

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16 *See Weeks v. Commonwealth*, 248 Va. 460, 450 S.E.2d 379 (1994).

cross-examination by Cressell's counsel. The jury returned a verdict of not guilty of the capital murder charge, instead convicting Cressell of first degree murder.[17]

If this Court upholds the position advanced by the Commonwealth, in future cases involving similar evidence, the Commonwealth will have no reason to put a Ceparano on the stand. After reaching an agreement with a co-defendant, it will be a simple matter to prosecute the alleged principal first, use the co-defendant's hearsay statement, and conclude the agreed upon disposition of the co-defendant's case later. This practice would preserve the Fifth Amendment "unavailability" of accused who had made the deal, rendering his hearsay statement admissible as a declaration against penal interest. As a practical matter, there is little reason to expect that this would not be precisely the practice that will flow from a holding in favor of the Commonwealth. The principal casualty in many cases will be the truth.

III. SUFFICIENCY OF "TRIGGERMAN" EVIDENCE IS OF GREATEST IMPORTANCE IN VIRGINIA CAPITAL CASES.

Not only does the issue of who caused the death of the victim arise often in Virginia capital cases, it is treated as a matter of utmost importance by the Supreme Court of Virginia, indeed as an exception to the traditional deference afforded to jury fact-finding.

It is well established under Virginia law that, unless a case is one of a killing for hire, "only the person who is the

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17 The reason given for the not guilty verdict on the capital murder charge was the weakness of the evidence adduced to prove that Cressell robbed the victim. *See* VA. CODE ANN. § 18.2-31(4) (Michie 1997).

immediate perpetrator [of the killing] may be a principal in the first degree and thus liable to conviction for capital murder." *Johnson v. Commonwealth*, 220 Va. 146, 150, 255 S.E.2d 525, 527 (1979) (interpreting VA. CODE ANN. § 18.2-18(b) (Michie 1997)). In addition, it has also been established that when a killing is one involving joint participation, both killers may be considered an "immediate perpetrator" or "triggermen" and both may be convicted of capital murder. *Coppola v. Commonwealth*, 220 Va. 243, 257 S.E.2d 797 (1980); *Strickler v. Commonwealth*, 241 Va. 482, 404 S.E.2d 227 (1991); *Briley v. Commonwealth*, 221 Va. 563, 273 S.E.2d 57 (1980).

If the death was not caused by joint action, as is the situation in the case at bar, determining who was in fact the "triggerman" is of the utmost importance. That is, of course, appropriate, since it is a matter of life and death. The capital jurisprudence of the Supreme Court of Virginia illustrates the primacy of this issue. With the exception of relief directly mandated by a decision of this Court, the Supreme Court of Virginia has granted relief on direct appeal to death-sentenced prisoners only twice in the last seven years. In both *Cheng v. Commonwealth*, 240 Va. 26, 393 S.E.2d 599 (1990), and *Rogers v. Commonwealth*, 242 Va. 307, 410 S.E.2d 621 (1991), the issue was sufficiency of the triggerman evidence.

In *Cheng*, the victim was shot four times in the head and neck and the defendant was the last person seen with the victim before his death. 240 Va. at 31, 393 S.E.2d at 601. There was evidence that the defendant "'masterminded' the criminal plan", "expressed an intent to commit robbery", "directed his accomplices to obtain a 'sawed-off' shotgun", and had made incriminating statements to the police. 240 Va. at 43, 393 S.E.2d. at 608. A piece of paper containing the defendant's name and address was also discovered in the car in which the victim's body was found. 240 Va. at 32, 393 S.E.2d at 602.

Due to this sizable amount of incriminating evidence against the defendant, a jury convicted him of capital murder. He appealed, contending that the evidence was insufficient to sustain a capital murder conviction, for there was no direct evidence in the record that he was the triggerman. The Supreme Court agreed, reversing Cheng's conviction, and stating that "[t]he evidence was insufficient ...to support the inference that the defendant fired the fatal shots." 240 Va. at 43, 393 S.E.2d at 608. The court continued: "Suspicion of guilt, however strong, or even a probability of guilt, is insufficient to support a conviction." 240 Va. at 42, 393 S.E.2d at 608. In *Cheng*, the Virginia Supreme Court made it clear that it is not easy for the Commonwealth to meet its burden of proving that the one accused of capital murder was the actual perpetrator of the crime beyond a reasonable doubt.

A case even more illustrative of the question before the Court in the case at bar was *Rogers v. Commonwealth*. In *Rogers*, the defendant was convicted of capital murder for brutally attacking, raping, and fatally stabbing a 74 year old woman. 242 Va. at 309, 40 S.E.2d at 622. Police interviewed Troy Malcolm, who apparently admitted that he was present in the victim's home at the time of the crime, but named Rogers as the killer. 242 Va. at 316, 410 S.E.2d at 626. Rogers was immediately arrested and interrogated. He admitted forcible entry into the house, robbing and raping the victim, but denied stabbing her. References by the interrogator to Malcolm's accusations were included as a part of Rogers' confession admitted at his trial. *Id.*[18] Rogers denied ever seeing a knife,

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[18] The interrogations in *Rogers* illustrate another aspect of the unreliability of untested co-defendant statements. The law enforcement officers who take the statements are often uninformed about and sometimes indifferent to the truth. Rogers was interrogated and released twice, the day after the crime and two days later. In the second interview, he implicated Malcolm. Two days later, Malcolm was interviewed and an arrest warrant

and testified that he was the last one to leave the scene because he was scared and had never seen anything like what had been done to the victim. 242 Va. at 316, 410 S.E.2d at 626. Forensic testing done by the Commonwealth's experts was inconclusive. 242 Va. at 317, 410 S.E.2d at 627.

Based upon this evidence, the defendant was convicted and sentenced to death. He appealed, and the Supreme Court, as in *Cheng*, reversed his conviction. In the words of the court:

> Whatever theory offered by the Commonwealth, we hold that the evidence is insufficient, as a matter of law, to prove that defendant actually stabbed the victim, or administered any other blows which caused her death. As we have said, all necessary circumstances must be consistent with guilt, must be inconsistent with innocence, and must exclude every reasonable hypothesis of innocence....the Commonwealth has failed to exclude Troy Malcolm [the co-defendant] as the perpetrator.

242 Va. at 319, 410 S.E.2d at 628.

These cases leave no doubt as to the importance of

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charging Rogers with capital murder was issued immediately upon conclusion of the interview. 242 Va. at 314-15, 410 S.E.2d at 625-26. The last of these interrogations was conducted within five days of the commission of the crime. Given that no forensic or other independent evidence pointing to Rogers or Malcolm as the killer was ever adduced, the strong suggestion arises that the police in this case had none at the time of the interrogations and just made a subjective decision about whose story they would believe.

Mark Lilly's hearsay statement.[19] Had it been excluded, as the Confrontation Clause requires, there is more than a reasonable likelihood that Benjamin Lilly would not have been convicted and sentenced to death, or that such conviction and sentence would not have been permitted to stand. To paraphrase the *Rogers* court, the Commonwealth has failed to exclude Mark Lilly and Gary Wayne Barker as triggermen, and has not established beyond a reasonable doubt that Benjamin Lilly in fact caused the death of the victim.

CONCLUSION

This Court in *Williamson* resolved the question now before it correctly on statutory grounds. There are no legitimate reasons for this Court to establish a less stringent Confrontation Clause standard. There are many reasons, however, that the standards should be the same on this point. They include (1) the fundamental importance of confrontation and cross-examination; (2) a comparison of the policy underlying recognition of the hearsay exception with the self-serving nature of the statement at issue here; (3) the negative practical impact on truth-finding of licensing prosecutors to shield unreliable witnesses from juries; (4) the similar impact of signaling to law enforcement officers that they may engage in interrogation techniques without meaningful concern for the truth; and (5) Benjamin Lilly's right not to be deprived of his life without due process.

For the foregoing reasons, *amici* urge this Court to

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19 *Amici* have not briefed the question of whether factors other than the circumstances of Mark Lilly's hearsay statement may be considered in the determination of its admissibility. On that point, *amici* adopt and support the position of petitioner that, under this Court's precedent, they may not.

reverse Lilly's conviction and remand the case for a new trial..

Respectfully submitted,

Lisa Kemler
National Association of
Criminal Defense Lawyers
108. Alfred Street
(703) 684-8000

Marvin Miller
Virginia College of Criminal
Defense Attorneys
1203 Duke Street
Alexandria, VA 22314
(703) 548-5000

William S. Geimer*
Professor of Law
Washington and Lee University
Virginia Capital Case
Clearinghouse
Lexington, VA 24450
(540) 463-8525

* Counsel of Record